KETUA PENGARAH HASIL DALAM NEGERI A

v.

THE PATALING RUBBER ESTATES LTD

HIGH COURT MALAYA, KUALA LUMPUR B
AZIAH ALI J
[CIVIL APPEAL NO: R1-14-13-2009]
15 NOVEMBER 2010

REVENUE LAW: *Real property gains tax - Liability for payment of - Whether disposal of land had taken place - Whether disposal of land occurred upon transfer of ownership of land - Real Property Gains Tax Act 1976, Schedule 2 para 16 - Whether disposal of land took place at the time a written agreement was entered into* C

This was an appeal against the decision of the Special Commissioners of Income Tax ('SCIT') setting aside the appellant's assessment of real property gains tax ('RGPT'). The respondent owned a piece of land which was to be sold to a certain purchaser. The sale and purchase agreement ('S&P agreement') was conditional upon approval from the Finance Investment Committee ('FIC') and the Estate Land Board (if applicable). The purchaser did not make any payment towards the purchase price and the said transfer was not registered. The S&P agreement was subsequently cancelled. The appellant contended that there was a disposal which gave rise to RGPT pursuant to s. 3 Real Property Gains Tax Act ('the Act'). The appellant submitted that a disposal of the said land had taken place when a written agreement had been entered by the parties. The respondent however claimed that although the S&P agreement had been signed, ownership had not been transferred to the purchaser, and hence, the disposal had not taken place. The issue to be determined was whether the disposal of the said land had taken place. D E F G

Held (dismissing the appeal with costs): H

(1) There can be no acquisition or disposal of assets unless and until the transfer of ownership had been effected; whereby the transfer of the ownership of the land had to be registered. In this instance, the said transfer was not registered and therefore, in respect of the respondent's claim there was no acquisition or disposal of the said land. (paras 10-12) I

A **(2)** Paragraph 16 of schedule 2 to the Act stipulates that when the S&P agreement was conditional upon approval of the government or an authority or committee appointed by the government, the date of the disposal would be the date when the approval was obtained and not when the parties entered
B into a written agreement. It was an admitted fact that the conditions were not satisfied. Thus, on the provision of para 16 above, the acquisition and disposal of the said land had not taken place. (para 13)

C **Legislation referred to:**
National Land Code, s. 215
Real Property Gains Tax Act 1976, ss. 2, 3(1)

For the appellant - Noor Kamaliah Japeri; SFC
For the respondent - Nik Saghir Mohd Noor; M/s Nik Saghir & Ismail

D *Reported by Melinda Robert*

JUDGMENT

E **Aziah Ali J:**

[1] The appellant appeals against the decision of the Special Commissioners of Income Tax ("SCIT") dated 2 April 2009 allowing the appeal by the respondent and setting aside the
F assessment of real property gains tax dated 25 November 2002 amounting to RM28,603,700 made by the appellant against the respondent.

[2] Relevant Facts Admitted Or Proved

G (i) The respondent is a company in the United Kingdom and having a registered office at 400, Capability Green, Luton, Bedfordshire, England and in Malaysia at 4th Floor, Wisma Consplant 1, No. 2, Jalan SS 16/4, Subang Jaya, Selangor;

H (ii) The respondent owned and operated the oil palm plantations known as West Estates, South Estate, North Estate and East Estate on several pieces of agricultural land described as Lot Nos. 2601, 2602, 2664, 2666, 2697, 2698 and 2700 all situated in Mukim Jugra, District of Selangor ("the said
I land"). The respondent acquired the said land before 1 January 1970;

(iii) By a sale and purchase agreement dated 23 April 1999 ("Sale and Purchase Agreement") executed between the appellant as vendor and its related company, Pulau Carey Properties Sdn. Bhd. as purchaser ("purchaser") the appellant agreed to sell and the purchaser agreed to purchase the said land at a total purchase consideration of RM202,500,000 ("purchase price");

(iv) The Sale and Purchase Agreement is a conditional agreement. Clause 2.1 of the Agreement reads as follows:

> 2.1 This Agreement is subject to and conditional upon the approval for the sale herein being duly obtained from the following:
>
> (a) the Foreign Investment Committee (hereinafter referred to as the "FIC");
>
> (b) if applicable the Estate Land Board (hereinafter referred to as "the Board").;

(v) None of the above approvals has been obtained within the six months period from the date of the Sale and Purchase Agreement (the "Approval Period"). No evidence the Approval Period has been extended. In fact the two approvals have never been obtained;

(vi) Other relevant terms of the Sale and Purchase Agreement are:

(a) the purchaser to pay a deposit of RM20,250,000 upon execution of the Sale and Purchase Agreement – see cl. 3.1(a); and

(b) the balance purchase price of RM182,250,000 to be paid within six months from Effective Date (the Completion Date);

Note that the "Effective Date" is defined in cl. 2.3 of the Sale and purchase Agreement to mean the date of approval of the FIC whichever is later or such extended date as mutually agreed in writing.

(vii) The purchaser had not made any payment at all towards the purchase price. Even the deposit was not paid. The payment of the deposit was later waived when the Sale and Purchase Agreement was cancelled.

(viii) The parties did not execute an instrument of transfer in Form 14A and the transfer of the said land to Pulau Carey Properties Sdn. Bhd. had never been registered in the relevant Land Office pursuant to the provision of the National Land Code;

(ix) The purchaser had not been given vacant possession of the said land but was allowed to incur expenses in connection with the carrying out of a feasibility study of a proposed project to be undertaken on the said land;

(x) The disposal was reflected in the Purchaser's Audited Account from 31 December 1999 to 31 December 2002.

(xi) The purchaser (Pulau Carey Properties Sdn. Bhd.) had incurred RM12,993,495 as a development expenditure done to the said land;

(xii) The Director's Report and Audited Financial statement for financial year ended 30 Jun 2003 of the purchaser shows that the purchaser also rent out the said land to Golden Hope Plantations (Peninsular) Sdn. Bhd., a related company for an amount of RM1,080,000 per annum;

(xiii) The appellant had declared the said land as its asset in their account after the Sale and Purchase Agreement was signed;

(xiv) By letter dated 21 January 2003, Ernst & Young Consultants Sdn. Bhd. on behalf of the respondent urged the appellant to discharge the assessment as the parties to the Sale and Purchase Agreement had mutually agreed to rescind the Sale and Purchase Agreement. The request was rejected by the appellant;

(xv) By Notice of Increase of Real Property Gains Tax dated 2 November 2005, the tax payable was increased to RM31,464,070 (including a 10% penalty of RM2,680,370 for late payment of tax);

(xvi) By Notice of Assessment in Form K, dated 25 November 2002, the appellant assessed the respondent to Real Property Gains Tax (RPGT) in the sum of RM28,603,700;

(xvii) The said assessment in the sum of RM28,603,700 was arrived at by the respondent as follows:

Disposal Price as determined by Appellant	–	RM583,000,000.00
Less Acquisition Price	–	RM10,926,000.00
Chargeable Gain	–	RM572,074,000.00
RPGT at 5%	–	RM28,603,700.00

(xviii) The respondent disagreed with the appellant's determination that the disposal price of the said land should be RM583,000,000. It is the contention of the respondent that the disposal price should be RM202,500,000 as valued by the Chartered Surveyor Messrs CH Williams Talhar & Wong and as agreed between the parties to the Sale and Purchase Agreement;

(xix) By a Deed of Revocation dated l7 January 2003, the parties rescinded the Sale and Purchase Agreement;

(xx) The respondent is aggrieved by the said assessment dated 25 November 2002 and therefore, the appellant filed a Notice of Appeal in Form Q dated 30 November 2006.

[3] The Issues For Determination By The SCIT

(a) whether in the circumstances of this case, there was a disposal which gave rise to real property gains tax under s. 3(1) of the Real Property Gains Tax Act 1976; and

(b) if there was such a disposal, whether the disposal price as determined by the respondent at RM583,000,000 was excessive.

[4] Before the SCIT the appellant contended as follows:

(a) the definition of "dispose" which includes "convey, transfer, assign, settle or alienate ..." and also the definition of "real property" to include any interest, option or other right in or over such land;

(b) the purchaser had incurred substantial amount in developing the said land;

(c) accounting treatment showing recognition that the said land had been transferred to the purchaser;

A (d) the Agreement was not void since the condition of getting approvals from FIC and ELB do not affect the validity of the Agreement unless the consideration price depends wholly or mainly on the conditions stipulated in the Agreement as provided for in para. 16 Schedule 2 RPGT Act 1976;

B (e) the Deed of Revocation is deemed to be a buy back transaction from the appellant to Pulau Carey Properties Sdn Bhd and the court does not have to be concerned about the gains;

C (f) the respondent had control over the said land by allowing the purchaser to rent out the said land to the holding company, Golden Hope Plantations Berhad.

[5] The respondent contended as follows:

D (a) there was no disposal of the said land because there was no transfer of ownership as the transfer had not been registered in the Land Office;

E (b) the Sale and Purchase Agreement being a conditional agreement was either void, not effective or unenforceable for lack of necessary approvals, ie, approvals from FIC and Estate Land Board;

(c) the Sale and Purchase Agreement was revoked; and

F (d) since the purchase consideration was never received by the appellant, there was no gain which had accrued to the appellant.

G **[6]** The SCIT found as follows:

(a) to be liable to real property gain tax, there must be chargeable gains within the ambit of s. 3 of the Real Property Gains Tax Act 1976 ("RPGT Act");

H (b) whether there was any disposal of the said land to the purchaser. If there was no disposal of the said land, then the questions whether there was a chargeable gain and accrued to the respondent does not arise;

I (c) the term 'dispose' is defined in s. 2 of the Act to mean, subject to subsection 4 sell, convey, transfer, assign, settle or alienated whether by agreement or by force of law;

(d) in this case the alleged disposal of the said land was never completed because the purchase price was not paid and the transfer of the said land to the purchaser was never registered in the Land Office;

(e) there was no transfer of ownership of the said land to the purchaser. The word 'disposal' in s. 3(1) of the Act must necessarily contemplate a disposal which is completed in the sense that the ownership of the said land had been transferred to the purchaser;

(f) the disposal is not completed unless there is transfer of ownership and that transfer is registered in the Land Office pursuant to s. 215 of the National Land Code;

(g) since no Form 14A had been executed by the parties and the transfer of ownership of the said land had not been registered in the Land Office pursuant to s. 215 the National Land Code, and the purchase price had not been paid, the disposal was not completed and therefore there cannot be any disposal under the Act;

(h) it is trite law the entry in the account is not conclusive and cannot override principles of law;

(i) the entries in the account have no effect on the true position of the Sale and Purchase Agreement;

(j) in view of the above facts, it is clear that there was no disposal of the said land which can give rise to real property gain tax. Therefore the issue No. 2 does not arise.

[7] By a deciding order dated 2 April 2009 the SCIT decided amongst others as follows:

> ADALAH DIPUTUSKAN bahawa berasaskan fakta kes ini, tidak ada pelupusan harta dibuat yang membolehkan cukai dikenakan di bawah Akta Cukai Keuntungan Harta Tanah 1976; dan dengan keputusan tersebut juga isu kedua dalam kes ini tidak lagi berbangkit.
>
> MAKA DENGAN INI ADALAH DIPERINTAHKAN bahawa rayuan ini dibenarkan

[8] For the appellant it is submitted that the issue is whether there has been a disposal of the said land. Counsel submits that registration of transfer is immaterial. It is submitted that by virtue of para. 15(1)(a) of Schedule 2 of the RPGT Act a disposal of the said land had taken place when a written agreement was entered into by the parties and not when the transfer is registered. Paragraph 15(1)(a) provides as follows:

> **15. Date of disposal and acquisition generally**
>
> (1) Except where this Schedule provides otherwise, a disposal of an asset shall be deemed to take place:
>
> (a) where there is a written agreement for the disposal of the asset, on the date of such agreement; or
>
> (b) where there is no written agreement, on the date of completion of the disposal of the asset.

[9] Counsel for the respondent submits that despite the sale and purchase agreement signed, ownership had not been transferred to the purchaser. As no transfer of ownership has taken place there is therefore no disposal. Since there is no disposal therefore there is no chargeable gain. It is not disputed that the purchaser has not paid the purchase price, not even the deposit. Therefore no tax is chargeable as against the respondent.

Decision

[10] Real property gains tax is chargeable in respect of a chargeable gain accruing on the disposal of any real property as provided by s. 3(1) of the RPGT Act as follows:

> **3. Taxation of chargeable gains**
>
> (1) A tax, to be called real property gains tax, shall be charged in accordance with this Act in respect of **chargeable gain accruing on the disposal of any real property** (hereinafter referred to as "chargeable asset"). (emphasis added)
>
> (2) Subject to this Act, the tax shall be charged on every ringgit of the total amount of chargeable gains accruing to a chargeable person in a year of assessment in respect of each category of disposal of chargeable assets specified in Schedule 5

Therefore real property gains tax only arises when there is: A

(a) a disposal of real property, and

(b) a chargeable gain accrues on such disposal.

The primary event that must occur before the issue of chargeable gain can arise is disposal of the real property. B

[11] Section 2 of the RPGT Act defines "dispose" to mean, subject to subsection 4, "sell, convey, transfer, assign, settle or alienate whether by agreement or by force of law". Paragraph 2 of Schedule 2 provides *inter alia* that an acquisition or a disposal of asset occurs when ownership of an asset is transferred from one person to the other as follows: C

> **Acquisition and disposal generally** D
>
> 2. Subject to this Schedule, every method, scheme or arrangement by which the **ownership of an asset is transferred** from one person to another shall constitute an acquisition of the asset by the transferee and a disposal of the asset by the transferor. (emphasis added) E

Therefore by virtue of para. 2 of Schedule 2, unless and until transfer of ownership is effected there is no acquisition or disposal of the asset. Therefore on the provisions of the Act I am unable to agree with Revenue Counsel that the issue of transfer is immaterial since it is the transfer of the asset that constitutes an acquisition by the transferee and a disposal by the transferor. F

[12] Transfer of ownership of land occurs on the registration of the transfer as provided for by s. 215 of the National Land Code ("NLC") as follows: G

> **215. Form, and effect generally, of transfer of land**
>
> (1) The transfer under this Act of any alienated land shall be effected by an instrument in Form 14A.
>
> (2) The title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land. H

I

In the present case it is not disputed that no transfer in the manner stipulated by s. 215 of the NLC has taken place. Therefore in respect of the respondent there has been no disposal of the said land.

[13] It is not disputed that the sale and purchase of the said land is subject to and conditional upon approval from the FIC and the Estate Land Board (if applicable) being obtained as stipulated under cl. 2.1 of the Agreement. Paragraph 16 of Schedule 2 provides that where a contract for the disposal of an asset is conditional, the acquisition or disposal of the asset takes place at the time the contract was made unless one of the two situations specified in subparagraph (a) or (b) applies as follows:

> **16. Conditional contracts**
>
> Where a contract for the disposal of an asset is conditional and the condition is satisfied (by the exercise of a right under an option or otherwise), the acquisition and disposal of the asset shall be regarded as taking place at the time the contract was made, unless:
>
> (a) the acquisition or disposal requires the approval by the Government or an authority or committee appointed by the Government, the date of disposal shall be the date of such approval; or
>
> (b) the approval referred to in subparagraph (a) is conditional, the date of disposal shall be the date when the last of all such conditions is satisfied.

It is an admitted fact that the conditions have not been satisfied. Thus on the provisions of para. 16 acquisition and disposal of the said land has not taken place. For the aforementioned reasons I agree with the respondent that the SCIT has correctly decided that there has been no disposal of the said land. In any event I find that in the absence of evidence of any chargeable gain accruing to the respondent, the requirements of s. 3 of the RPGT Act has not been satisfied. The appeal is therefore dismissed with costs of RM4,000 to the respondent.